No. 14779

United States Court of Appeals

For the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 183, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

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THE ARGUS PRESS, SEATTLE

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BRIEF OF PETITIONER

JURISDICTION

This petition was filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160 (f) (hereinafter called the Act), to review and set aside an order of the National Labor Relations Board.

Homer W. Robinson, d/b/a Alaska Beverage Co. (hereinafter called the Employer) is engaged in business in the Territory of Alaska, and Teamsters, Chauffuers, Warehousemen & Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chaufieurs, Warehousemen & Helpers of America, AFL, is a labor organization engaged in promoting and protecting the interests of its members in the Territory of Alaska

within this judicial circuit, where the unfair labor practice occurred. This court, therefore, has jurisdiction of this petition by virtue of Section 10 (f) of the Act.

STATEMENT OF THE CASE

Petitioner is a labor organization engaged in promoting and protecting the interests of its members in the Territory of Alaska. On August 9, 1954, it filed a charge with the National Labor Relations Board (hereinafter called the Board) in which it alleged that the Employer was guilty of an unfair labor practice in violation of Sections 8 (a) (1) and (5) of the Act, in that the Employer had refused to bargain collectively with the petitioner. The petitioner had won a representation election at the Employer's plant on May 26, 1953, conducted pursuant to Section 9 (a) of the Act, and was thereafter duly certified as the collective bargaining representative of the employees of the Employer at his plant at Fairbanks, Alaska (R. 8, 12).

On the 4th day of November, 1954, the Regional Director for the 19th Region issued his complaint charging the Employer with an unfair labor practice in violation of Sections 8 (a) (1) and (5) of the Act (R. 6-10). The Employer filed his answer, admitting that he was engaged in commerce within the meaning of Section 2 (6), but denying that he was engaged in commerce within the meaning of Section 2 (7) of the Act (R. 11). A hearing was held before a trial examiner, on November 22, 1954 (R. 29). At the hearing it was stipulated that the Employer during the past year had made purchases consisting principally of bottles, ground sugar and concentrates in the sum of approxi-

mately $75,461.00, 95% of which was shipped into the Territory of Alaska from points outside the Territory, and during the same period the Employer made sales locally in the sum of approximately $226,000.00 (R. 30-31).

On January 7, 1955, the trial examiner issued his intermediate report and recommended order, recommending that the complaint be dismissed for the reason that the Employer's annual volume of business did not meet the Board's self-imposed jurisdictional standards (R. 17-23). Exceptions to the intermediate report and recommended order were filed by General Counsel of the Board (R. 24-25). On March 17, 1955, the Board issued its order adopting the intermediate report and recommended order of the trial examiner, and, accordingly, dismissed the complaint in its entirety (R. 26-28).

Since both the trial examiner and the Board ruled that the complaint should be dismissed, no decision was made at either stage on the merits of the unfair labor practice charge.

STATEMENT OF POINTS

I.

Under Section 2 (6) of the Act, the Board was required to assert jurisdiction regardless of its self-imposed jurisdictional standards applied to the 48 states.

II.

In making its determination as to whether it should assert jurisdiction, the Board was required, under Section 2 (6) of the Act to consider the effect on commerce

within the Territory of Alaska of the unfair labor practice charge against the Employer, and its refusal to assert jurisdiction was based upon a misconception of law, because it refused to consider the effect of unfair labor practices in commerce, *within* the Territory.

SUMMARY OF ARGUMENT

It is the petitioner's contention that Section 2 (6) of the Act, defining the term "commerce," sets the standard for the exercise of the Board's jurisdiction *within* the territories, and that the Board ignored the language of that definition. Section 2 (6) of the Act provides:

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or *within* the District of Columbia or *any Territory,* or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." (Emphasis supplied)

The italicized words of Section 2 (6) clearly require that the Board shall consider the volume of commerce *within* the Territory of Alaska. The trial examiner and the Board ignored the words "*within* any Territory," and applied to the Territory the same self-imposed jurisdictional standards for the assertion of jurisdiction with respect to commerce "among the several States."

ARGUMENT

I. Statutes Involved

There are only three sections of the Act which have any bearing on the question presented:

Section 2 (6):

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or *within* the District of Columbia or *any Territory,* or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." (Emphasis supplied)

Section 2 (7):

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Section 10 (a):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry * * * even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

While Section 10 (a) of the Act says the Board is "empowered" to prevent unfair labor practices "affecting commerce," what constitutes an unfair labor practice "affecting commerce" must be determined by reference to the definition of the terms "commerce" in Section 2 (6) and "affecting commerce" in Section 2 (7).

It should be noted here that the definitions of the terms "commerce" and "affecting commerce" were not changed by the amendatory act of 1947. However, when the National Labor Relations Act was amended in 1947, there was added to Section 10 (a) a proviso authorizing the Board, under certain circumstances, to cede its jurisdiction to an agency established in any State or Territory.

The Supreme Court has held in the following cases that the Act was intended to encompass the full reach of the commerce power of Congress:

Polish National Alliance of the United States of America v. NLRB, 322 U.S. 643, 88 L.Ed. 1509, 64 S.Ct. 1196;

NLRB v. Fainblatt, 306 U.S. 601, 83 L.Ed. 1014, 50 S.Ct. 668;

NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615;

Consolidated Edison Company of New York, Inc., v. NLRB, 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206.

II. The Board Has Read Out of the Act the Word "Within" in Section 2(6)

In 1954, with a change of administration, the National Labor Relations Board announced a new set of jurisdictional standards to be applied in determining the question of whether the Board would assert jurisdiction in a particular case. These new standards were enunciated by the Board in *Jonesboro Grain Drying Cooperative,* 110 NLRB No. 67, 35 LRRM 1038. In that case, the Board said:

> "Accordingly, we have determined that in future cases the Board will assert jurisdiction over enterprises which annually meet one or more of the following standards:
>
> "(1) *Direct inflow standard*: An enterprise which receives goods or materials from *out of State,* valued at $500,00 or more.
>
> "(2) *Direct outflow standard*: An enterprise which produces or handles goods and ships such goods *out of State,* or performs services *outside the State* in which the enterprise is located, valued at $50,000 or more.
>
> "(3) *Indirect inflow standard*: An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises receive from *out of State,* valued at $1,000,000 or more.
>
> "(4) *Indirect outflow standard*: An enterprise which furnishes goods or services to other enterprises coming within sub-paragraph (2) above, or to public utilities or transit systems, or instrumen-

talities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; and (a) such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at $100,000 or more; or (b) such goods or services, regardless of their use, are valued at $200,000 or more.

"(5) *Multistate standard*: An establishment other than retail which is operated as an integral part of a multi-state enterprise, and (a) the particular establishment involved meets any of the foregoing standards; (b) the direct outflow of the entire enterprise amounts to $250,000 or more; or (c) the indirect outflow of the entire enterprise amounts to $1,000,000 or more.

"We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction." (Emphasis in part supplied)

Although in none of the above five standards is there any mention of commerce "*within*" the District of Columbia or Territories, the trial examiner and Board relied on these standards to decline jurisdiction (R. 23, 27). In its decision the Board said:

"Since the Intermediate Report was issued in this case, the Board's decision in *Conrado Forestier, d/b/a Canteria Providencia,* 111 N.L.R.B. No. 141, has been issued, in which *the Board made clear that its jurisdictional standards would be uniformly applied in the Territories as in the several States. Accordingly, as the Respondent's operations fail to meet any of the Board jurisdictional standards,*[1] we find, for the reasons stated in *Can-*

> *teria Providencia,* that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety." (Emphasis supplied) (R. 27)

As its sole authority, footnote 1, the Board cited *Jonesboro Grain Drying Cooperative,* 110 NLRB No. 67, *supra* (R. 27).

The Board in deciding whether to assert jurisdiction in the case at bar was required by the Act to consider and give meaning to the word *"within"* in Section 2 (6). This the Board failed to do. It considered only the flow of commerce "between" the Territory of Alaska and other States or Territories. This clearly was error. In establishing jurisdictional standards for the Territories the Board must consider, at least, the location, size and economic and industrial development of the Territories and adopt standards to be applied with respect to "trade" or "commerce" *"within"* the Territories.

Congress does not have constitutional authority to regulate intra-state commerce but it does have plenary power to regulate commerce "within * * * any Territory," and it has clearly indicated its intention to exercise that authority to its fullest extent (Section 2 (6) of the Act). It is, therefore, incumbent upon the Board to give effect to the congressional intent when establishing jurisdictional standards for the Territories, and its refusal so to do is pure abdication of authority vested in the Board by the Act.

Prior to the recent change of administration and personnel of the Board, the Board had asserted plenary jurisdiction in the Territories. In *Panaderia Sucesion*

Alonso, 87 NLRB 877, 25 LRRM 1146, the Board asserted jurisdiction over a bakery in Puerto Rico which employed only three production workers, and during the year made purchases from the United States which totalled approximately $7,800.00. All of the products of the bakery were sold locally. Asserting jurisdiction, the Board said:

> "It may well be true, as the Trial Examiner suggests, that were the Respondents' bakery located in one of the 48 States, we would dismiss this proceeding on the ground that the business involved is so small and local in nature that an interruption of its operations by a labor dispute would have only a remote and insubstantial effect on commerce. However, the term 'commerce' when applied to Puerto Rico has a broader meaning than when applied to any of the States. By statutory definition, all trade *within* any Territory is embraced by the term 'commerce,' whereas with respect to a State, only trade between such State and outside points is embraced by that term. *In consequence, the Board has plenary jurisdiction over all business enterprises within Puerto Rico.*" (Emphasis partly supplied)

The question of exercising plenary jurisdiction in the Territories was before the First Circuit in *National Labor Relations Board v. Gonzales Padin Co.,* 161 F. (2d) 353 (1947). The court there said:

> "It is established by several decisions of the Supreme Court and this Circuit Court of Appeals that Puerto Rico is a completely organized territory, although not one incorporated into the United States, and that as such the power of Congress to legislate respecting it is plenary, subject only to

such constitutional restrictions as apply to the situation, none of which concern us here. See *Cases v. United States,* 1 Cir., 131 Fed.(2d) 916, 919, 920, and the cases cited therein. Thus Congress can constitutionally regulate purely intra-territorial commerce. And we think there can be no doubt that Congress must have intended to exercise this power when in Section 10 (a) of the National Labor Relations Act it gave the Board authority to prevent any person from engaging in any unfair labor practice affecting commerce, and in Section 2 (6) of the Act defined commerce to include 'trade * * * within * * * any Territory.' That is to say, we think Congress in the National Labor Relations Act intended to deal comprehensively with labor disputes affecting commerce. (See *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 607, 59 S.Ct. 668, 83 L.Ed. 1014) just as in the Sherman Anti-Trust Act of 1890, 15 U.S.C.A. Secs. 1-7, 15 note, as supplemented by the Clayton Act of 1914, 38 Stat. 730, it intended to deal comprehensively with contracts, combinations and conspiracies in restraint of trade. (*Puerto Rico v. Shell Co.,* 302 U.S. 253, 259, 58 S.Ct. 167, 82 L.Ed. 235) and to that end exercised all the power it possessed in the premises."

The Board until 1954, in numerous cases, exercised plenary jurisdiction over enterprises in the Territories. In that year in *Virgin Isles Hotel, Inc.,* 110 NLRB 558, 35 LRRM 1068, the Board, for the first time, refused to exercise plenary jurisdiction in the Territories. In that case the Board refused to assert jurisdiction over a hotel located on St. Thomas Island in the Virgin Islands, relying on its established policy of declining jurisdiction over the hotel industry *in the 48 States.*

Member Murdock, in a well-reasoned dissenting opinion, pointed out that the Board, recognizing that the term "commerce" when applied to the Territories had a broader meaning than when applied to the States, had previously exercised its plenary jurisdiction in the Territories, without regard to the size, type or volume of business of the enterprise involved; and that in declining jurisdiction it was refusing to perform its statutory duties. Member Murdock said:

> "Apart from its specific effect upon hotels in the Territories, and the District of Columbia, the instant decision indicates a marked rescission of the Board's plenary jurisdiction in these areas. The Board has previously exercised such plenary jurisdiction, for well-founded reasons, without regard to the size, type, or volume of business of the enterprise involved. The majority opinion, in this case, accordingly, constitutes a major alteration in this Agency's jurisdictional policy comparable to those affecting the continental United States (except for the District of Columbia) upon which I have commented generally in my dissenting opinion in *Breeding Transfer Company,* 110 NLRB 493. As was true of the new standards of jurisdiction discussed in the *Breeding* case, this change is similarly inconsistent with the Act and the responsibilities which it imposes on this Agency, involving a determination to withhold protection of the Act which properly should be made to Congress.
>
> "The Board exercise of jurisdiction over enterprises in the Territories and the District of Columbia is specifically directed in a statute which the Board administers. As the courts have previously pointed out,
>
> " ' * * * Congress can constitutionally regulate

purely intra-territorial commerce. And we think there can be no doubt that Congress must have intended to exercise this power when in Section 10 (a) of the National Labor Relations Act it gave the Board authority to prevent any person from engaging in any unfair labor practice affecting commerce, and in Section 2 (6) of the Act defined commerce to include "*trade* * * * *within* * * * any Territory'." (Emphasis supplied)

"The Board has previously observed that, by this statutory definition '*all* trade *within* any Territory is embraced by the term "commerce," whereas with respect to a State, only trade between such State and outside points is embraced by that term.' [Emphasis, in part, supplied.] It is thus clear that the statement of the majority decision in this case that 'the relationship to commerce is no greater here than in the case of a hotel operating in any of the 48 States' is contrary to the explicit terms of the Act which define commerce differently with respect to Territories and the District of Columbia.

"The concurring opinion also fails to recognize the fact that 'commerce' is differently defined with respect to Territories. The operations of this or any other employer in a Territory or the District of Columbia will obviously have a greater effect upon all trade within that area than the operations of a similar establishment in the States would have upon commerce between and among the States."

Since the *Virgin Isles Hotel* case the Board:

(1) Refused to assert jurisdiction over a retail pastry and food business in Puerto Rico where the enterprise did not meet its jurisdictional standard for retail enter-

prises in the 48 States. *Sixto Ortega,* 110 NLRB No. 251, 35 LRRM 1345.

(2) Refused to assert jurisdiction over the taxicab industry in the Territory of Alaska for the same reason it had declined jurisdiction over that industry in the 48 States. *Union Cab Co.,* 110 NLRB No. 259, 35 LRRM 1346.

(3) Refused to assert jurisdiction over a radio station in Puerto Rico because its annual income was below $200,000.00, the minimum jurisdictional standard established in the 48 states. *South P. R. Broadcasting Corporation,* 111 NLRB No. 45, 35 LRRM 1457.

(4) Refused to assert jurisdiction over a stone quarry in Puerto Rico, *Canteria Providencia,* 111 NLRB No. 141, 35 LRRM 1596, for the following reasons:

> "There is no question that the Employer's operations fail to meet any of the standards recently decided by the Board as necessary for the assertion of jurisdiction. The sole issue stems from the fact that the Employer's business is located in a Territory of the United States. Since the promulgation of the new jurisdictional standards, *the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 states.* In those earlier cases, the Board indicated that no exception as to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 states. We believe that the same principle has application here. *Accordingly, in the present case and*

in future cases, the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States." (Emphasis supplied)

(5) Refused to assert jurisdiction over another radio station in Puerto Rico for the reason that the employer's gross annual business of $80,000.00 did not meet the $200,000.00 annual gross income requirement for radio stations in the 48 states. *W. P. R. A., Inc.,* 111 NLRB No. 186, 35 LRRM 1652.

Despite the fact that the statutory definition of the term "commerce" in Section 2 (6) is identical with reference to the District of Columbia and the Territories the Board, nevertheless, has seen fit to apply to enterprises in the District of Columbia different jurisdictional standards than in the Territories in dealing with identical industries. Indeed, with respect to enterprises within the District of Columbia the Board has disregarded the size, type or volume of the business or enterprise involved. This, we believe, clearly demonstrates that the Board has consciously and arbitrarily disregarded the statutory definition of the term commerce "*within* the District of Columbia *or any Territory*" (Section 2 (6)).

In *Ginn & Co.,* 114 NLRB No. 25, 36 LRRM 1517, the Board asserted jurisdiction over an employer operating a warehouse and two stores in the District of Columbia and one store in the State of Virginia, although the employer's volume of business did not meet the Board's jurisdictional standard for the 48 States, relying on its plenary jurisdiction within the District of Columbia.

In *National Truck Rental Co.*, 114 NLRB No. 26, 36 LRRM 1521, the Board asserted jurisdiction over an employer engaged in renting passenger cars and trucks in the District of Columbia although its volume of business did not meet the Board's minimum jurisdictional standard in the 48 States, again relying on its plenary jurisdiction.

In *Curtis-Bros., Inc.*, 114 NLRB No. 27, 36 LRRM 1530, the Board asserted its plenary jurisdiction over a company engaged in rug cleaning and in selling, moving and storing furniture within the District of Columbia.

In *Carlyle Hotel of Washington, Inc.*, 36 LRRM 1542, and *Dodge Hotel Co.*, 36 LRRM 1542, the Board asserted its plenary jurisdiction over the hotel industry in the District of Columbia, despite the fact that it had consistently declined jurisdiction over that industry both in the territories and in the 48 States. See: *Virgin Isles Hotel, Inc.*, 110 NLRB 558, 35 LRRM 1068, *supra.*

The Board found that the Employer "is engaged in the manufacture, sale and distribution of carbonated beverages in Fairbanks, Alaska" (R. 27). Concerning the annual dollar volume of its operations the Board further found:

> "During the past year its [Employer's] purchases amounted to approximately $70,500 of which 95% was obtained from outside the Territory; *Respondent's sales during the same period amounted to approximately $226,000, all of which were made within the Territory.*" (R. 27) (Emphasis supplied)

Dismissing the complaint, the Board said that "its

jurisdictional standards would be uniformly applied to the Territories as in the several States" (R. 27). And finding that the Employer's operations "failed to meet *any* of the Board's jurisdictional standards" established for the States in *Jonesboro Grain Drying Co-Operative,* 110 NLRB No. 67, 35 LRRM 1038, dismissed the complaint in its entirety. We have carefully examined those standards and find none based upon an employer's gross dollar volume sales within a state. This omission is, no doubt, attributable to the fact that Congress does not have the constitutional authority to regulate intra-state commerce. Congress, however, does have the authority to regulate intra-territorial trade or commerce and has exercised that authority by its definition of the term "commerce," as applied to the Territories in Section 2 (6) of the Act.

While the Board is undoubtedly authorized to establish appropriate jurisdictional standards for the Territories based upon the volume of business transacted or sales made *within* the Territories it has not exercised that authority but, instead, has applied jurisdictional standards established for the 48 States, none of which fits the commerce here involved. As a result, trade and commerce within the Territories will be wholly unregulated and both labor and management will be unprotected from unfair labor practices.

While Board Member Murdock signed the Decision and Order of the Board he was careful to direct attention to the fact that, in *Canteria Providencia* (111 NLRB No. 141, 35 LRRM 1596) "he dissented from the adoption of this policy of applying U. S. standards to the Territories in place of the Board's former ple-

nary policy" (R. 27). In his dissent in that case Member Murdock stated, in forceful and convincing terms, the cogent reasons against abandoning the plenary jurisdiction which the Board had asserted in its prior territorial decisions. That statement is more convincing than any argument we can present. We, therefore, take the liberty of quoting from it:

> "A further important consideration is the fact that the cutting of the Board's plenary jurisdiction will mean an absence of any regulation or control of industrial disputes in these excised areas in the territories. In the stringent U. S. industry standards, like the $3,000,000.00 gross receipts test for utilities and local transit systems, may well exclude enterprises which are of great importance to the economy of the territories whose cities may not be large enough to have utilities meeting the U. S. standards. To my knowledge, neither Alaska nor Hawaii has any administrative machinery to do this work. Moreover, although there is an insular board in Puerto Rico, our own decisions have previously pointed out that under judicial decisions, even where such machinery is set up, local authorities are powerless to act even in cases where the Board declines jurisdiction * * *. In other words, the majority's action can only constitute a contribution to chaos in the areas now excised from the Board's jurisdiction in the territories, whether or not it is motivated by desire to withdraw in favor of local authorities. If it is so motivated, the withdrawal is subject to the additional objection that it is a circumvention of the cession requirements of Section 10 (a) of the Act * * *."

The Board's policy of applying U. S. jurisdictional standards to the Territories is, we submit, arbitrary and

unreasonable. That the Board has not hesitated to make arbitrary and unreasonable "jurisdictional standards" is demonstrated, as we have shown above, by the fact that, in the hotel industry, it has asserted jurisdiction in the District of Columbia and at the same time declined jurisdiction in the 48 States and the Territories.

CONCLUSION

For all the foregoing reasons this case should be remanded to the National Labor Relations Board for further proceedings pursuant to a proper exercise of its plenary jurisdiction in the Territories.

Respectfully submitted,

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